

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1216

Amending Civil Rule 72  
concerning actions for the  
condemnation of property

IT IS ORDERED:

1. Civil Rule 72 is rescinded and re-enacted to read as follows:

(a) **Applicability of Other Rules.** The procedure for the condemnation of property under the power of eminent domain is governed by the Civil Rules, except as otherwise provided in this rule.

(b) **Joinder of Properties.** The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use. Severance shall be freely granted in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.

(c) **Commencement of Action.**

(1) *Complaint.* An action for the condemnation of property under the power of eminent domain is commenced by filing a complaint and, if used, a declaration of taking. The complaint, in order to be

accepted for filing, must be accompanied by a completed case description on a form provided by the clerk of court.

(2) *Contents of Complaint.* (A) The complaint must contain:

(i) a caption naming as defendants the persons described in subsection (c)(2)(A)(vii), commencing with the apparent owners of the fee simple interest in the property to be taken, and the property designated generally by kind, quantity, and location;

(ii) a statement of the authority and necessity for the taking;

(iii) a statement of the use for which the property is to be taken;

(iv) a description of the property to be taken sufficient to identify and locate it;

(v) a statement of the interests to be acquired, including the terms and conditions of any easements;

(vi) a statement of the amount of money the plaintiff estimates to be just compensation for the taking;

(vii) the name and apparent interest of all persons having or claiming an interest in the property who can be ascertained by a reasonably diligent search of the records or otherwise known to the plaintiff to claim an interest in the property.

(B) The statement of just compensation required under subsection (c)(2)(A)(vi) constitutes a judicial admission by the plaintiff. The names and apparent interests required under subsection (c)(2)(A)(vii) do not constitute admissions by the plaintiff.

(3) *Exhibits to Complaint.* The decisional document for the taking and a map or plat of the property to be taken must be attached as exhibits to the complaint.

(d) **Process.**

(1) *Summons.* Upon filing of the complaint, the clerk shall forthwith issue a summons in condemnation and deliver it to the plaintiff, who shall cause the summons and a copy of the complaint to be served in accordance with Civil Rule 4. Upon request of the plaintiff, separate or additional summonses shall issue against any defendants.

(2) *Contents of Summons.* (A) A summons in condemnation must state:

(i) the court where the action was filed;

(ii) the caption of the action;

(iii) the name of the defendant to whom the summons is directed;

(iv) the name, address and telephone number of plaintiff's counsel; and

(v) the name of the judge to whom the case is assigned.

(B) The summons must also state:

(i) that if the defendant disputes the authority and necessity for the taking or objects to the declaration of taking, the defendant must file within twenty days after service of the summons upon the defendant an answer stating all of the defendant's objections and defenses;

(ii) that failure to file an answer within such time constitutes a waiver by the defendant of all objections and defenses to

the authority and necessity for the taking and to the validity of the declaration of taking;

(iii) that if the action is not dismissed, the time when plaintiff may take possession, the amount of compensation to be paid for the taking, and the distribution of compensation will be determined by further proceedings in the action;

(iv) that if the defendant disputes the amount of just compensation, or claims any part of the compensation to be paid in the action, or desires notice of further proceedings in the action, the defendant must file within twenty days after service of the summons upon the defendant a notice of appearance, stating the name and address of the person to whom notice should be sent, or the court will proceed to a final determination of just compensation without further notice to the defendant; and

(v) that a defendant who fails to appear within the time specified may file a notice of appearance at any time before a final determination of just compensation is made and may present evidence as to the amount of just compensation to be paid or its distribution; however, the filing of an

untimely notice of appearance, absent a showing of good cause that would justify setting aside a default under Civil Rule 55(e), does not relieve a defendant of the effect of prior orders entered by the court or a final determination of just compensation;

(vi) that ten days following a final determination of just compensation the court will enter judgment by default for the relief demanded in the complaint against any defendant who has failed to appear.

(3) *Service.* The summons, a copy of the complaint and, if used, a copy of the declaration of taking must be served on the defendants and return of service made in conformity with Civil Rule 4.

(e) **Answer or Appearance.**

(1) *Answer.* If the defendant objects to the authority and necessity for the taking or to the validity of the declaration of taking, the defendant must file an answer stating all of the defendant's objections and defenses. The answer must be filed within twenty days after service of the summons upon the defendant.

(2) *Notice of Appearance.* If the defendant disputes the amount of just compensation, or claims any part of the compensation to be paid in the action, or desires to receive notice of further proceedings in the action, the defendant must file a notice of appearance, stating the name and address of the person to whom notice should be sent. The notice of appearance must be filed within twenty days after service of the summons upon the defendant. A notice of appearance preserves all claims concerning the amount of compensation to be paid and its distribution. A notice of appearance may be filed with an answer.

(3) *Disclaimer.* If a defendant has no objection to the taking or to loss of possession of the property, or no claim to any part of the compensation deposited or to be paid in the action, the defendant may file a disclaimer of interest in the proceedings. A disclaimer may be filed after an answer or appearance. The parties and the court are not required to provide notice of proceedings to a defendant who has filed a disclaimer.

(4) *Failure to Respond.* Failure to file an answer within the time specified in subparagraph (e)(1) constitutes a waiver by the defendant of all objections and defenses to the authority and necessity for the taking and to the validity of the declaration of taking. The filing of an untimely notice of appearance, absent a showing of good cause that would justify setting aside a default under Civil Rule 55(e), does not relieve a defendant of the effect of prior orders entered by the court or a final determination of just compensation. Ten days following a final determination of just compensation, the court upon motion, may enter judgment by default for the relief demanded in the complaint against a defendant who has not filed a notice of appearance.

(5) *Other Pleadings or Motions.* All objections and defenses to the taking must be set forth in the answer. No counterclaims, cross-claims, or third party claims are allowed, unless the court determines that such claims should be consolidated with the condemnation action under Civil Rule 42(a).



(f) **Amendment of Pleadings.** The plaintiff may amend the complaint without leave of court at any time before trial of the issue of compensation and as many times as desired; however, no amendment may be made which would result in a dismissal prohibited under paragraph (i) of this rule. Service of the amended complaint upon a party who has appeared must be made as provided in Civil Rule 5(b). Service upon a party who has not appeared must be made as provided in paragraph (d) of this rule. A defendant who is served with an amended complaint may file and serve a response within the time allowed by paragraph (e) of this rule.

(g) **Substitution of Parties.** If a defendant dies or becomes incompetent or transfers its interest in the litigation, the court shall order substitution of the proper party upon motion. The provisions of Civil Rule 25(a) do not apply to actions proceeding under this rule. Service of the motion upon a person not already a party to the action must be made as provided in Civil Rule 4.

(h) **Hearing and Trial.**

(1) *Special Discovery Rules.*

(A) *Expedited Discovery on Authority, Necessity and Possession.* Any time after service of the summons, any party may conduct discovery, including depositions, regarding matters to be decided at the hearing provided for under subparagraph (h)(2). Responses to interrogatories, requests for production or inspection, and requests for admissions must be served within fifteen days after service of the interrogatories or requests; however, a defendant need not respond earlier than ten days after the time allowed for filing an answer.

(B) *Appraisals and Expert Reports.* Each party, within forty-five days after filing its complaint, answer, or appearance, must exchange with every other party who has answered or appeared all appraisals of property within the scope of the taking completed within the five years preceding the date of taking. Forty-five days before the master's hearing and again thirty days before the close of discovery, the parties must simultaneously exchange all appraisals of the property and expert reports relating

to just compensation completed since the summons was issued.

(2) *Authority/Necessity/Possession.*

(A) *Declaration of Taking.* If no objection to authority and necessity for the taking is contained within the answer, filed within the time period provided by subparagraph (e)(1) of this rule, the court shall enter an order confirming authority and necessity. If timely objection is made, the objecting party must, within thirty days after service of the summons, file a motion to dismiss setting forth the objections with specificity. The plaintiff may file an opposition to the motion within ten days after service of the motion upon the plaintiff. The objecting party may file a reply within three days after service of the opposition upon the objecting party. Either party may request a hearing. The court shall hold a hearing within twenty days after a request for hearing is filed. The hearing will be based on the record unless a request for evidentiary hearing and statement of genuine issues of material fact is filed by the objecting party with the motion or by the plaintiff with the opposition and the court determines that there are genuine issues of material fact.

In the event the objections are found to be valid, the court may dismiss the action, remand to the condemning entity for further findings, or order such other relief as allowed by law.

(B) *Motions for Possession under AS 09.55.390 and .400.* Upon the filing of a motion pursuant to AS 09.55.390 or 09.55.400, the court shall schedule and conduct a hearing on the motion. The motion, any opposition to the motion, and any reply by the moving party must be in the form and filed within the time limits prescribed by Civil Rule 77 for dispositive motions, except that no opposition shall be due earlier than thirty days after service of the summons upon that defendant.

(C) *Other Condemnation Actions.* In an action in which neither a declaration of taking nor the procedures set forth in AS 90.55.390-.400 have been utilized, a party may move, no earlier than sixty days after service of the summons upon all defendants, for an order determining whether there is authority and necessity for the taking. The motion, any opposition to the motion, and any reply by the moving party must be in the form and filed within the time limits

prescribed by Civil Rule 77 for dispositive motions.

(D) *Possession.* In an action in which a declaration of taking has been filed, a party may move, either contemporaneously with proceedings on authority and necessity or after authority and necessity has been determined, for an order setting the date and terms under which possession of the property will vest in the plaintiff. In an action subject to AS 09.55.380, any party may move to have the questions of possession decided after a final determination of compensation is made or after the plaintiff has deposited sufficient funds or security to satisfy the court that the parties are protected.

(E) *Finality.* An order entered under section (h)(2)(A), (B), or (C) is a final judgment for purposes of appeal under Appellate Rule 202.

(3) *Master's Hearing.*

(A) *Procedure.* A master will be appointed to hear evidence and to ascertain the amount to be paid by the plaintiff to each owner or other person interested in the

property, unless the master's hearing is waived under section (h)(3)(B) of this rule. Any interested party may move the court for an order appointing the master. The motion must set forth the name, address and phone number of any individual proposed as master, proposed instructions to the master, a written oath, and a form of report for use by the master. The form of report must incorporate a cover sheet in a form prescribed by the Administrative Director of the Courts. The court may appoint a master from the nominees of the parties or of its own nomination, subject to the provisions of Civil Rule 42(c). The order of reference to the master must set forth the master's duties and powers and must be accompanied by instructions on the law that the master must apply. Civil Rule 53 does not apply to master's proceedings under this rule.

(B) *Waiver.* If all parties agree, the master's hearing may be waived and the matter set for trial. In that event, A Notice of Waiver of Master's Hearing shall be filed, along with proof of service under Civil Rule 5 upon all parties to the action.

(4) *Filing of Master's Report.* The master shall file the master's report with the cover sheet prescribed by the

Administrative Director of the Courts. The clerk of court shall promptly serve the report on all parties who have answered or appeared.

(5) *Appeal From Master's Report.* (A) Appeal in the form of a trial de novo may be taken from the master's report by filing a memorandum to set trial within the following time limits:

(i) the plaintiff may appeal within ten days after service of the master's report; and

(ii) a defendant may appeal within fifteen days after service of the master's report.

(B) The memorandum to set trial must contain the information required by Rule 40(b)(1)(a)-(d), (f), and (g).

(6) *Demand for Jury Trial.* (A) If all parties to the action have waived appointment of a master under subparagraph (h)(3), a jury trial may be had if demand is made by any party within twenty days after service of the Notice of Waiver of Master's Hearing upon that party. Otherwise, trial will be by the court.

(B) Upon filing of an appeal under subparagraph (h)(5), a jury trial may be had if demand is made by any party within twenty days after filing of the appeal from the master's report. Otherwise, trial will be by the court.

(i) **Dismissal of Action.**

(1) *As of Right.* If no hearing has commenced to determine the compensation to be paid for the property and the plaintiff has not acquired title or a lesser interest in or taken possession of the property, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal describing the property as to which the action is dismissed.

(2) *By Stipulation.* Before entry of judgment vesting the plaintiff with title or a lesser interest in or possession of the property, the action may be dismissed in whole or in part, without an order of the court, as to any property by stipulation of the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.



(3) *By Order of the Court.* Any time before compensation for property has been determined and paid, the court may dismiss the action as to that property after motion and hearing, except that the court may not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest taken. The court may dismiss at any time a defendant unnecessarily or improperly joined.

(4) *Want of Prosecution.* The court shall not enter an order dismissing a case for want of prosecution. On its own motion or upon motion of a party, the court may schedule a pretrial conference to expedite resolution of a case.

(5) *Effect.* A dismissal under this paragraph is without prejudice except as otherwise provided in the notice, stipulation, or order.

(j) **Deposit and Its Distribution.** The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain, and

may make such deposit even when not required to do so by law. The notice of deposit must disclose the extent to which the deposit represents principal, interest, costs and fees, if any. The court and attorneys shall expedite the proceedings for distribution of the deposit and for ascertainment and payment of just compensation. The court may order distribution of the deposit at any time. Such order is effective only as to parties whose time to appear has expired. Upon entry of an order distributing funds on deposit, the clerk of court shall disburse the funds expeditiously. If the compensation finally awarded to a defendant exceeds the amount that has been paid to the defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of the defendant for the deficiency. If the compensation finally awarded to a defendant is less than the amount that has been paid to the defendant, the court shall enter judgment against the defendant and in favor of the plaintiff for the overpayment.

(k) **Costs.** Costs and attorney's fees incurred by a defendant must be assessed against the plaintiff if:

(1) the taking of the property is denied;

(2) the plaintiff appeals from the master's award and the defendant does not appeal;

(3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant;

(4) the action was dismissed under the provisions of paragraph (i) of this rule; or

(5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the defendant.

Attorney's fees allowed under this paragraph must be commensurate with the time expended by the attorney throughout the proceedings.

(1) **Offer of Judgment.** A party may make an offer of judgment to another party under the provisions of Civil Rule 68, which shall apply to eminent domain actions in all respects except as set forth below.

(1) If the plaintiff makes a successful offer of judgment against a defendant, the defendant may not recover costs and fees incurred after the making of the offer of judgment except as reasonable and necessary to evaluate the offer of judgment. This shall not preclude the award of costs and fees as allowed under Civil Rule 72(k)(1)-(5) incurred prior to the making of the offer of judgment. In no event shall a defendant be required to pay the costs and fees of the plaintiff.

(2) If a defendant makes a successful offer of judgment against the plaintiff, the defendant is entitled to recover full reasonable and necessary costs and attorney's fees without regard to Civil Rule 72(k).

(3) For purposes of applying Civil Rule 68, the defendant is the party making the claim and the plaintiff is the party defending against the claim. Any adjustment in interest rates shall operate only from the date the offer of judgment was made. When two defendants use Civil Rule 68 as against the other, the adjustment in prejudgment interest provisions do not apply.

(m) **Definitions.** For purposes of this rule, a final determination of just compensation is not made until all issues of the amount of just compensation to be paid and

its distribution to the parties entitled to just compensation are resolved by the entry of judgment on a jury verdict, the court's confirmation of an award of the master, a final order of the court accepting a settlement agreement of the parties, or the last such order or judgment that resolves any part of these issues.

#### Notes

(c)(3) For an explanation of the decisional document requirement in cases under AS 09.55.420-.460, see Ship Creek Hydraulic Syndicate v. State, 685 P.2d 715, 715-20 (Alaska 1984).

(1)(1) The limitation on a defendant's right to recover costs and fees incurred after the making of an offer of judgment is subject to any constitutional right the defendant may have to receive compensation for these expenses.

2. The section of the summons in condemnation required by Rule 72(d)(2)(B)(v), which advises a defendant of the defendant's rights upon filing an untimely notice of appearance, must also advise the defendant of the meaning of the term "final determination of just compensation."

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Chief Justice Moore

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Justice Rabinowitz

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Justice Matthews

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Justice Compton

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Justice Eastaugh